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JAMES H. McKE

Brief for Boyle & Shirley for A

SUPREME COURT OF THE UNITED STATES.

Filed Apr. 6, 1899.

LOUISVILLE TRUST COMPANY, - *Appellant,*

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, &c., - *Appellees.*

BRIEF FOR APPELLANT.

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Counsel.

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SUPREME COURT OF THE UNITED STATES.

LOUISVILLE TRUST COMPANY, - - - *Appellant,*

VERSUS

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO., &c., - - - - - - - - - *Appellees.*

This case affords a striking illustration of a railroad foreclosure and reorganization. It furnishes an example, probably without its equal, of the wreck of a railroad corporation, and of its renewal and regeneration under the protecting influence of a court of the United States. It also shows how the great powers of a court of equity may be unwittingly used to assist in the consummation of a fraud, which that court was created to prevent.

A seemingly prosperous railroad company, against which there were, on August 22, 1896, no judgments on which execution could issue; which had never defaulted in the payment of interest on its mortgage bonds, and with no installment of interest falling due for more than two months, was placed by the Circuit Court of the United States in the hands of its Vice-President and General Manager as its Receiver. And within less than seven months thereafter, it had defaulted on three issues of bonds, and had been sold under a decree of foreclosure for a failure to pay $228,775.00 of unpaid coupons, with nearly $15,000,000.00 of bonds outstanding; and the sale had been confirmed, and the road ordered to be conveyed to the purchaser. This purchaser

was the new company, composed of the bondholders and stockholders of the old. No change had occurred during this proceeding to attract attention to its progress, and after it was over, the same old officers, representing the same old stockholders, continued to pursue the same old course. A new name was painted on the same old cars, and the ticker in Wall Street thereafter quoted "CIL" instead of "LNA." The old stockholders, with the assistance of the bondholders, had thus established themselves, as they think, successfully in the ownership of their old property without having paid their debts. The case, as it appears from the record, is as follows:

STATEMENT OF CASE.

I.

In a suit brought by the Louisville, New Albany & Chicago Railway Company against the Louisville Trust Company and others, for the purpose of obtaining a cancellation of an endorsement of guarantee made by the complainant upon the bonds of a Kentucky railroad, the Circuit Court of Appeals for the Sixth Circuit had decided that the complainant was not entitled to relief as to $250,000 of bonds represented before the Court, and which were owned by *bona fide* holders for value without notice, and that as to these bonds the complainant was bound on its guaranty. The decision is reported in Louisville Trust Company v. L., N. A. & C. R. R., 75 Fed. R. 433. The record in this case was ordered by the Supreme Court to be certified to it, and it has been argued and is still here pending and undetermined.

Thereafter, on the 24th of August, 1896, the appellee, John T. Mills, jr., brought a suit in the Circuit Court of the United States for the District of Indiana, and on the same day a judg-

ment by confession was awarded for the sum of $494,911.25; and on the same day an execution was issued upon the judgment, and was duly returned by the marshal "No property found." And on the same day Mills filed his Creditors' Bill, setting up the judgment, execution, and return, and in behalf of himself and other creditors alleged that the defendant, the Louisville, New Albany & Chicago Railway Company, had unlawfully guaranteed the payment of $1,185,000 of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, a corporation of the State of Kentucky, and that the Circuit Court of Appeals for the Sixth Circuit had decided that the corporation was liable upon such guaranty to such holders of the bonds as had acquired them in good faith and without notice; and that, by reason of such decision, the property of the defendant company was liable to be seized by process of law, for the purpose of satisfying such obligation.

The allegation of insolvency, and the purpose of the suit, and the prayer for relief are as follows:

> "10. Complainant further shows that the defendant has no property except its railroad, equipment, and appurtenances, and the corporate stock heretofore specified, and that all such property is described in and covered by one or more of the five mortgages hereinbefore set out, and that it has no resources to pay its unsecured debt except such surplus income from its road operations as may remain after discharging the interest upon mortgage bonds.
>
> "The corporate officers report that the current earnings of the road, in consequence of a short wheat crop and lessened traffic, are about $60,000 a month less than for the corresponding period of last year, and that such decline in earnings is likely to continue for some months, and that it will be impracticable to realize from such earnings after payment of operating expenses, taxes, and rentals a sum sufficient to pay the next shortly maturing coupons upon the $3,800,000 general and equipment mortgage bonds, and that both such liens will be defaulted upon at the next interest day.

"The decision rendered within the last month holding the defendant liable for over a million dollars by reason of such bond guarantee, has, in this period of exceptional shrinkage in traffic, absolutely destroyed the credit of the defendant corporation so that it can not either pay or renew its bank obligations or fund the same, and the said corporation is in fact insolvent.

"11. Complainant charges that the owned and operated lines of railroad of the said defendant corporation lie in three different States, and are subject to the jurisdiction of the courts in each of the counties in the said three States in which any part of the property is situated; that it owns a large amount of rolling stock, materials, and supplies necessary for the operation of the line, and that the unity of the property and its integrity as a whole, as now held and operated as a railway line connecting important cities in the three different States and engaged in domestic and interstate commerce, constitutes an important element of its value, and that to permit its severance or the continuous disturbance of its operations will result in ruinous sacrifice to every creditor of said corporation, and disable it from performing its duties as a public carrier. That the complainant verily believes that unless this court, in view of the present condition of the affairs of said insolvent corporation and the divers threatened litigations, attachments, and seizures, and the impending and inevitable default soon to occur on the two mortgage liens aforesaid, will deal with the property as a single trust fund and take it into its judicial custody for the protection of every interest therein, that divers individual creditors of the defendant will proceed to assert their remedies in the different courts in the several States where the property is situated; that levys and attachments will be laid upon the engines and cars of the company, and the fuel, material, and supplies which are indispensable to the continuous operation of the railroad will be seized, which will greatly interfere with and ultimately prevent the company from a proper discharge of its duties as a carrier and seriously diminish the earnings of the road; that considerable and unnecessary multiplicity of suits will result; that judgments and priorities will be attempted and the trust property, valuable mainly in consequence of its unity, will be dismembered by the conflicting decrees and judgments of the many courts exercising such separate jurisdictions at the suit of individual creditors.

"Inasmuch, therefore, as the complainant has no ade-

quate remedy at law for the grievances hereinbefore stated, and can only have relief in equity, he files this bill of complaint in behalf of himself and all others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany & Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments or levies, this court will forthwith appoint a receiver for the entire railroad property, choses in action, and assets of every description, wherever situated, belonging to the said defendant corporation, with authority to manage and operate the same as the officer of and under the protection of this court, with the usual powers of a receiver in such cases, and that all of the officers, managers, superintendents, and employes of the said railway company shall be ordered and required forthwith to deliver up possession of all and singular every part of the said property of said insolvent corporation over which the said receiver is thus appointed, and shall also deliver over all books of account, offices, vouchers, and papers in any way relating to the present business or operation of said system of railway, and shall be restrained from interfering in any way whatever with the possession and control of the receiver over any part of said property so to be delivered to him. That the court will fully administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshall all the assets of said insolvent corporation and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities of each and all of the creditors of the said Louisville, New Albany & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the

said line of railroad, appurtenances, and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation."

II.

The only defendant to the bill of complaint was the Louisville, New Albany & Chicago Railway Company. This company, having theretofore on the same day promptly confessed judgment in favor of the complainant for $494,000, with equal promptness filed its answer to the bill of complaint, admitting all the material allegations thereof; and, interposing no objection, the Court thereupon appointed the company's Vice-President and General Manager as Receiver of the property. In the order of appointment no provision was made for the Receiver's filing any report of his earnings and expenses, and none was filed. He was required to file only monthly reports of his receipts and disbursements, and, as these reports contain no information of any value and have no relation whatever to earnings and expenses, they were not copied into the Record. It does not appear, therefore, in this case what were the earnings and expenses received or incurred in the operation by the Receiver; and the court below, in administering the property, and the parties to the cause, never knew or had an opportunity to know the results of the operations.

III.

The seizure by the court of all the assets of the defendant corporation, and also of its current net income, necessarily forced the corporation to make default in the installment of interest which became due October 1st, and which amounted to the sum of $141,000—this being the semi-annual interest on an issue of $4,700,000 of bonds. On November 1st the corporation again made default on an issue of $2,800,000 of bonds, which interest amounted to the sum of $70,000; and on December 1st it made like default upon an issue of $709,000 of bonds, which interest amounted to $17,725. Bills were filed by the trustees in the different mortgages thus defaulted to foreclose the same, and the entire interest in default aggregated the sum of $228,725.

IV.

During the progress of the proceedings below it did not appear what were the net earnings derived by the Receiver, and therefore it does not appear whether or not these defaults were necessary. By the seizure of the property the Court below had constituted itself trustee for the administration of the property, and it would seem that a proper course of procedure would have demanded an investigation of the necessity of such default and of a consequent foreclosure. On the contrary, however, the court below from time to time made orders for the disbursement of moneys, which could better have been used for the purpose of preventing a foreclosure of the mortgages. Thus, on September 23d the Receiver was directed to pay to certain quarry owners the sum of $18,000 out of the earnings of the road, on account of their construction of certain railroad switches, and which they had agreed to receive payment for by way of rebates of freight upon their shipments. It seems, however, that the Court

chose to anticipate such rebates, and to pay the amount at once. And again, on November 24th, the Receiver was authorized to borrow $200,000 for the purpose of changing the alignment of track and the removal of certain curves therein, for completing the ballasting of a certain division, etc. This borrowed money was to be paid entirely out of earnings, and was not to be a charge upon the property ahead of the bonds. It could, therefore, and should have been used to relieve the property of the necessity of a foreclosure. This single amount so borrowed, with two days' earnings, would have paid every dollar for which the Company was in default.

Instead of doing this, however, the Court rather chose to almost double the amount which it would be necessary to pay in order to prevent a foreclosure, so that, when the decree was entered, instead of being subject to redemption by the payment of $228,725, it had been charged by the Court with the additional sum of $200,000. The original suit on the creditors' bill, and the several suits of foreclosure instituted upon the mortgages in default, were consolidated and ordered to proceed under the title of The Farmers Loan & Trust Company of New York and John H. Barker, Trustees, v. The Louisville, New Albany & Chicago Railway Company and others. (Record, page 97.) No step had then been or was ever afterward taken in the cause to bring the creditors of the corporation before the court. No step was ever taken by the complainant in the creditors' bill to ascertain or to secure for the creditors any assets of the corporation, and the consolidated cause proceeded to a decree, and the creditors' right to redeem was barred and foreclosed without any notice and without any effort in any way to bring them before the court, except so far as they were represented by the original complainant. There was never any reference to a master to take proof of claims or to report upon assets and upon the liens thereon, and no testimony was ever taken in the cause.

V.

On January 23, 1897, however, the Louisville Trust Company and the Kentucky National Bank filed intervening petitions. These petitions simply alleged that they were the several holders of bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, and payment of which had been guaranteed by the defendant, the Louisville, New Albany & Chicago Railway Company, and which guarantee had been adjudged and held to be valid by a judgment of the Circuit Court of Appeals for the Sixth Circuit, and praying for leave to intervene in the said cause in their own behalf. Whereupon it was by said court "Ordered, that the said Louisville Trust Company and the said Kentucky National Bank be and they are hereby admitted to appear in the proceedings in this case, each in its own behalf." On that day (January 23, 1897) the court entered the decree of sale.

VI.

As soon thereafter as was practicable, *i. e.*, on February 27, 1897, the Louisville Trust Company filed its intervening petition in the said cause (Rec. p. 189). This petition sets up in detail the issue of bonds by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, the guarantee thereof by the Louisville, New Albany & Chicago Railway Company, the purchase of the bonds by the Louisville Trust Company, and the adjudication of their validity by the United States Circuit Court of Appeals for the Sixth Circuit. The substantial grounds on which the said petition was filed are as follows:

> "And the petitioner further says that afterwards John T. Mills, jr., instituted a suit against the said New Albany Company in the United States Circuit Court for the District

of Indiana on August 24, 1896, and the said company appeared thereto and confessed judgment; and on the same day a writ of *fieri facias* was issued thereon, and on the same day was returned wholly unsatisfied; and thereupon on the same day, the said John T. Mills, jr., filed his bill of complaint herein and moved for the appointment of a receiver to take charge of all the assets and properties of the said defendant company, and to which the said company appeared and confessed the allegations of the bill of complaint; and thereupon W. H. McDoel was appointed receiver, who had theretofore been the General Manager of the said Company. And the petitioner charges that the said John T. Mills, jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value of which is unknown to your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or to bring into court the assets which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors; that afterwards, on November 12, 1896, the Farmers Loan and Trust Company filed its bill against the said New Albany Company to foreclose the mortgage executed to the complainant as trustee, dated January 1, 1886, to secure an issue of ten millions of dollars of bonds; and also on the same day the Central Trust Company filed its bill of complaint to foreclose a mortgage executed by the said New Albany Company to the Central Trust Company and John H. Stotsenberg, trustees, on May 1, 1890. And on the same day, November 12, 1896, an order was entered herein consolidating the said causes and extending the receivership under such bills; and thereafter, on the 23d day of January, 1897, a decree was entered herein foreclosing the said mortgage and ordering a sale of the mortgaged properties, and all of which was done *before there was a right to have such decree entered*, and without bringing before the court the general or unsecured creditors so that they might be heard in their own behalf.

"*And the petitioner further says that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and a reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors,* and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

The petition then averred that the mortgages sought to be foreclosed and on which a decree had been entered, were void as to the property in the State of Illinois, under the decision in the case of American Loan & Trust Co. v. Minnesota Co., 167 Ill. 641.

The petition further set forth that, by the terms of the mortgages foreclosed, there was no right to institute proceedings for foreclosure until a period of six months had elapsed, and that the decree was, therefore, erroneous and unjust in enforcing a sale before the mortgagees were entitled to it.

On all of these grounds the petition prayed that the decree of sale be set aside; that the cause be referred to a commissioner to take proof of its debts, and to ascertain and report upon the net earnings, and the property embraced and not embraced by the mortgages; and in addition, prayed as follows (Record, p. 198):

"Wherefore, the petitioner prays that an order be entered herein, commanding the plaintiff, John T. Mills, jr., the Farmers Loan and Trust Company of New York, the

Central Trust Company of New York, and the Louisville, New Albany & Chicago Railway Company to appear within a time to be fixed in such order, and to plead or make answer to the allegations herein; and for all such other and further orders and judgments as to the court shall seem meet and proper."

And on the same day the Court entered the following order:

"The petition of the Louisville Trust Company filed herein on the 27th day of February, 1897, came on to be heard this day and was argued by counsel, and upon consideration thereof the court refuses to vacate the decree of foreclosure and sale heretofore entered in this cause on the 23d day of January, 1897, and refuses to enter an order postponing or adjourning the sale."

VII.

The Court having thus refused to set aside the decree or to adjourn or postpone the sale, it took place on March 10th, and on the same day the report of the sale was confirmed and the deed ordered to be made to the purchaser. No notice was given, and no time allowed in which the report of sale could be excepted to. Having been admitted as a party to the proceeding by special order of Court, and having thus become subject to its orders and decrees—by which it would be bound—the reported sale, on the same day on which it was made, was confirmed by consent of other parties and without notice to the Louisville Trust Company or other creditors.

This was quite adroit, because counsel foresaw that, if an opportunity was allowed, the Louisville Trust Company would certainly file exceptions to the report of sale, and that such exceptions, based upon the same allegations as were contained in its intervening petition filed before the sale, would enable this creditor to adduce before the Court the evidence to support it. In other words, it was clear to them that the Louisville Trust

Company would undertake and would prove that the whole proceedings in this case had been conducted and the sale had been made and the property bought in, under a confederation between the bondholders and the stockholders, by which the property should be bought for their benefit, and that the stockholders would thus be enabled to continue their interest in the property without the payment of their obligations.

VIII.

Under these circumstances, the only resource left to the Louisville Trust Company was an appeal, and this appeal was prosecuted, and the decision of the Circuit Court of Appeals for the Seventh Circuit affirming the decree below is reported in: Louisville Trust Co. v. Lou., N. A. & C. R'y Co., 84 Fed. R. 539. That court held that the Louisville Trust Company, being an unsecured creditor, could not be made a defendant, and was neither a necessary nor proper party, and rather illogically said that unless the Louisville Trust Company had asked and obtained leave to put in an answer, it could not defeat the equities of the bill, declaring that it would be a travesty upon equity proceedings. Thereupon the Louisville Trust Company filed its petition before the Supreme Court, and in accordance with it a writ of *certiorari* was granted, and the record is now before this court.

ARGUMENT.

I.

"The Court erred in entering the decree of foreclosure and sale herein, because the said cause had not been prepared and was not ready for hearing, and the said hearing and decree was entered prematurely."

This was the first error assigned on the appeal. It was based on the fact that no step or proceeding of any kind had been taken under the creditors' bill to prepare it for a decree. No advertisement for creditors to prove their claims, no reference to a commissioner was made, and absolutely nothing done on which to render a decree under the original bill of complaint. When the suits for the foreclosure of the several mortgages were consolidated with the creditors' bill it became one suit, and it is submitted that no decree should have been entered until the main cause had been duly prepared. While it can not be asserted to be true, yet it is not improbable that if the creditors' suit had been prepared, it might not have been necessary ever to have rendered a decree of foreclosure. The effect of consolidation is as follows:

> "When consolidation is consented to by all the parties, they in effect agree that the separate actions shall be discontinued, and a new and distinct action shall be created, in which shall be included and litigated all of the questions presented by the pleadings in the former actions." (4 Enc. of Pleadings and Practice, 701.)

In the case of the Mercantile Trust Co. v. The M., K. & T. R. R., 41 Fed. R. 8, Mr. Justice Brewer refused to consolidate certain cases, and said:

> "But the cases are not ripe for a decree, and there is no certainty as to when either one will be. If one be delayed while another is speedy, it may be that consolidation never will be proper, for the mortgagee who is prompt ought not to suffer for the delay of one who is a laggard."

It was evidently the opinion of the learned Justice that the effect of consolidation was to postpone separate proceedings, and that a decree would not be entered until each part of the consolidated cause had been prepared. It is submitted that, until the creditors' suit had been prepared, the creditors brought before the court, and the extent of the assets and liens determined, it could not be known whether a foreclosure was necessary, nor could the creditors determine whether or not they would be able to redeem the property.

II.

The Circuit Court of Appeals erroneously decided that the appellant "Had no standing in the Court below; at best it was only a general creditor of the defendant company, having and claiming to have no interest or lien upon the real estate and franchises of the company which formed the subject of the foreclosure suits."

In support of this decision the Court cited authorities in support of the well known rule that general creditors are neither necessary nor proper parties in a suit for foreclosure. It would seem to be a complete answer to say that this was not a suit for foreclosure. The original bill of complaint, under which the Court seized all the property and assets of the insolvent Railway Company, was framed in behalf of all creditors, and for a winding up of the affairs of the corporation and the distribution of its assets to whomsoever might be found to be entitled. It was part

of the prayer of the bill that the Court would fully administer the trust fund thus created, and distribute the entire assets among those who might be found to be creditors. But even if this were not so, the Bill of Complaint itself alleged the existence and validity of these obligations, and set forth in detail that the Circuit Court of Appeals for the Sixth Circuit had adjudged and decreed that they were valid and subsisting obligations, and that the defendant corporation was liable thereon; and that, because of this adjudication, it had become necessary to wind up the affairs of the corporation.

The Circuit Court of Appeals further based its decision on the ground that the appellant did not file or offer to file an answer in the court below. The appellant never was a defendant. On the contrary, if the order admitting him in the case be given any effect, it was that he was a party complainant in connection with the original judgment creditor. There appears absolutely no ground on which the appellants could proceed in filing or offering to file an answer. Their intervening petition was a pleading—one which was meant to attack the judgment rendered—and it is submitted that it was the only pleading which the creditor could file in the cause. It will be observed that that pleading made the charge of a conspiracy between the Company and its mortgagees to procure the foreclosure and sale for the purpose of reorganizing the property in the interest of the stockholders and without the payment of the Company's liabilities, and it prayed that the mortgagees in the Company should be required to answer the allegations. By refusing to set aside the decree or postpone its execution, the Court practically denied the prayer. The only other possible way for the creditor to have brought the matter before the Court was by exceptions to the sale, and the right to do this was denied by the immediate confirmation.

Upon the question of the standing of a creditor in court, the result of the authorities may be thus stated:

First. A simple contract creditor has no right to proceed in equity to subject the property of his debtor, but must first exhaust his remedy at law. And in this respect there is no difference between an individual and a corporation.

Graham v. R. R. Co., 102 U. S. 148;
Hollins v. Brierfield Coal Co., 150 U. S. 371.

Second. In case of the death of an individual, however, a creditor, though without a judgment, may file a bill for discovery of assets and a distribution of the estate.

Thompson v. Brown, 4 Johnson Chancery, 619;
Hegan v. Walker, 14 Howard, 29;
Kennedy v. Cresswell, 101 U. S. 641:
Johnson v. Waters, 111 U. S. 640–670;
1 Story's Equity, 546;
Pullman v. Stebbins, 51 F. R. 10;

and in such a case an injunction will go against creditors suing at law.

Bispham's Equity, Sec. 530;
Rhodes v. Arnsinck, 58 Md. 345;
Thompson on Corp., Sec. 6897.

If the analogy between the corporation and individual proceeds further, then, to a corporation which comes into a state of civil death, the same rule must apply, and the authorities confirm this. The doctrine that the assets of a corporation constitute a trust fund to be distributed among its creditors, only becomes effective when that corporation ceases to exist as an active, going concern—which is practical death. Thus in Graham v. R. R. Co., 102 U. S. 148, the court, by Mr. Justice Bradley, said:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A

> court of equity, at the instance of the proper parties, will then make those funds trust funds, which, under other circumstances, are as much the absolute property of the corporation as any man's property is his."

Prior to the above decision, Mr. Chief Justice Waite had observed, in Terry v. Anderson, 95 U. S. 636:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation."

And Mr. Justice Brewer said in Hollins v. Brierfield Co., 150 U. S. 371, of the doctrine announced in Graham v. R. R. Co.:

> "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And Mr. Justice Harlan, in the very recent case of Sutton Mfg. Co. v. Hutchinson, 63 F. R. 496, rendered the opinion of the Circuit Court of Appeals for the Seventh Circuit, and reviewing the authorities, decided that when a private corporation becomes insolvent and ceases to perform the functions for which it was created, it becomes civilly dead, and that moment there is created a trust in all officers and persons holding its assets, for the benefit of its creditors.

So that, whatever may be the rule, the authorities are all agreed that when a court seizes the assets of a corporation for the purpose of administering the trust and distributing the assets among its creditors, it invests these assets with a trust, in which any creditor, with or without judgment, is entitled to share.

Case v. Beauregard, 98 U. S. 119, 101 U. S. 688;
Belmont Nail Co. v. Col. Iron Co., 46 Fed. R. 337;
Continental Trust Co. v. Toledo R. Co., 82 Fed. R. 642;
Thompson on Corp., Sec. 6897.

Third. The rule which requires a creditor to have judgment before proceeding in equity, seems not to be entirely clear. Apparently the rule rests upon two principles: One is, that the liability of the defendant shall be ascertained and the amount of the debt be determined at law, and in those cases, if the debt be admitted, then no judgment at law is necessary. (Johnson v. Waters, 111 U. S. 640–670; Tompkins v. Catawba Mills, 82 Fed. R. 780).

But there are cases which also hold that not only must the creditor have judgment, but he must have exhausted his remedies at law by suing out execution, and must have a return of "no property found" before he will be allowed to proceed in equity. But, as in the other case, the law never requires a useless thing; and so, if a court of equity has already taken all of the assets of a corporation into its grasp for the purpose of distributing them among its creditors, it surely could not require every creditor to obtain a judgment, sue out execution, and have a return of "no property." In fact, a court of equity would enjoin the useless and futile prosecution of such suits at law. "All creditors are in a sense deemed to be before the court," and will be bound by the decree. (Story's Eq. Pl., Sec. 99.)

Fourth. Strangely enough, the court below held that the Louisville Trust Company was not a judgment creditor. The bill of complaint under which the Circuit Court seized the property of the corporation was based on the fact that the appellant and others had judgments establishing the validity of their claims against the defendant Company. The bill states that the United States Circuit Court of Appeals for the Sixth Circuit had decided that "The defendant corporation is liable on such guaranty to all persons who obtained such bonds for value and without notice that the majority of its stockholders had not petitioned for or authorized the guaranty," and that such court of appeals

further held and decided that "upon the evidence, all of the bonds covered by the decree, except a small number, were acquired in good faith and without such notice, and that the defendant corporation was therefore liable upon such guaranty."

The petition of the Louisville Trust Company to be made a party in the cause sets forth that it was one of the parties in whose favor the Circuit Court of Appeals had so decided. That judgment is in full force and has not been suspended or superseded. It is true that this Court has awarded a writ of certiorari to the Circuit Court of Appeals, and that the cause is now pending in this Court, but the judgment below is still in full force.

The fact is, the jurisdiction and action of the court below were based on the fact that the appellant had such a judgment. And yet the court decided that the appellant had no standing in court because it had no judgment. If the object of the judgment is to ascertain and fix the liability, then the plaintiff is a judgment creditor. If, ordinarily, in addition to such judgment, he must have sued out execution in order to have a standing in a court of equity, the rule can not apply in this case where the court has seized every asset which was subject to execution.

In this case, moreover, the court below, without objection, granted the request of the petition of intervention and allowed the appellant to be made a party to the proceeding in its own behalf. There can be no doubt of the power of the Court in such cases, and the consequent right of the appellant to appeal from any errors in the proceedings affecting his interest.

Sage v. Central R. R., 93 U. S. 412–419;
French v. Gapen, 105 U. S. 509–525.

A decree which barred the equity of redemption, affected the rights of every creditor in whose behalf the Court had seized the property. In fact, the filing of the bill created an equitable levy for the benefit of all persons who were entitled to distribution out of the value of that equity.

III.

The decree of foreclosure was erroneous because it was for more than was enforcible on the mortgages at the time it was rendered.

The Court below decreed that the defendant company should within ten days pay the past due interest on the three mortgages foreclosed, aggregating the sum of $232,477.12, and that unless the said payment should be made within the time directed, the equity of redemption should be foreclosed and forever barred, and that the property should be sold for the purpose of paying the amount so decreed.

It is evident that if this decree required the payment of more than was then enforcible, it was erroneous.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This was assigned for error on appeal, but met with no consideration by the court. Indeed, in the opinion of the Appellate Court, it is said:

> "The *sole* ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the Court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages," etc.

This statement is incorrect, for, in fact, not only was the amount of the decree assigned for error, but it was the point most elaborately argued and relied on in the Circuit Court of Appeals, and, as it did not receive consideration there, the appellants now ask it from the Supreme Court. One of the mortgages so foreclosed was given to the Farmers Loan and Trust Company and John H. Barker, trustees, and it was then,

and it is now, contended that under that mortgage there was no right in behalf of the trustees to institute proceedings of foreclosure. Their powers and rights are all derived from the deed of trust, which is found in Record, page 69. The provisions of that deed which apply to the question are as follows:

The second provision (R. p. 74) provides:

> "Until default shall be made in payment of the principal or interest secured by said bonds, or some of them, the railroad company shall be permitted to possess, manage, operate and enjoy, all and singular, the mortgaged premises, with their appurtenances, and to take and use the rents, incomes, profits, and issues thereof in the same manner and to the same effect as if this indenture had not been made."

The third clause is as follows:

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made and *shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured thereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same; and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular the mortgaged premises and property, of every sort and description, to the trustees. It shall also be lawful for the trustees, in case *such default shall be made and continue as aforesaid*, and payment be demanded, and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description."

Then follow provisions as to manner of sale and disposition of proceeds. The fourth clause provides that

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made *and shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees, if they shall elect so

to do, may, and if requested in writing by the holders of one half of the bonds secured thereby and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage, and sale of the mortgaged premises and property, and for the appointment in the mean time of a receiver of the mortgaged premises under this indenture, the trustees to have the right to nominate and designate the person to be appointed receiver, and so far as lawfully may be done, to control and direct the general course of the administration of the mortgaged premises by and on the part of such receiver. *In the event of such right of foreclosure and sale accruing, for non-payment of interest,* immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature of penalty for breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto." (R. pp. 75 and 76.)

Whether or not the other mortgages foreclosed conferred any right upon the trustees to institute proceedings immediately upon default, need not be discussed. The decree on one mortgage, before the trustees were entitled to institute proceedings for foreclosure, makes the decree erroneous. In other words, if the decree *nisi* was for more than sufficient to pay the amount then due and enforcible, it was error, for if the decree had been for the correct amount, then those entitled to redeem might have been able to relieve the forfeiture. Thus, in Chicago R. R. Co. v. Fosdick, 106 U. S. 47–71 :

> " It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for as it is an illegal

exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. Bigler v. Waller, 14 Wall, 297; Shillaber v. Robinson, 97 U. S. 68 . . . and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due."

The right of the mortgagor in deeds of trust "to stipulate for a breathing spell for the payment of his matured debts" is clear, and the sole question is whether such a stipulation has been made.

Farmers L. & T. Co. v. Chicago R. R. Co., 61 Fed. 546.

In deeds where provisions similar to those in clauses 2 and 3 provide for the exercise by the trustee of the right of possession and sale *without judicial action*, and which limit the exercise of this right, such provisions do not prevent the institution of proceedings in court before the limitation has expired.

Morgan's La. R. R. Co. v. Texas R. R., 137 U. S. 171.

But, on the contrary, if there is a provision in the mortgage which limits the right to institute a suit to foreclose, then that limitation will govern the exercise of the right.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This distinction was drawn and made clear in the case in 137 U. S. 171, *supra*.

It will be observed that in the fourth clause of the Farmers Loan and Trust Company mortgage, the right of the trustee to foreclose is expressly limited. It is provided that "if the default shall continue for the space of six months, *then the trustees may*, and, if requested by the holders of one-half of the bonds, *shall*

apply to the Court for a foreclosure." This clause would be unmeaning unless it were given this effect, for, as it says that in that event *they may* institute proceedings, it would be absurd to say that they *might* do it before; and such was the decision in the Fosdick case.

The meaning is, however, put beyond doubt by the following sentence in the same clause: "*In the event of such right of foreclosure* and sale accruing from non-payment of interest, *immediately thereupon* the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the Trustees, become due and payable." In other words, the option to declare the principal due arose at the same time as the right to foreclose, and it would be unusual and extraordinary to interpret that to mean the day of the default. It was evident that the right to institute proceedings to foreclose was intended to be postponed until the expiration of six months. In this case the proceedings were begun and the decree entered and the sale made and confirmed, all before the six months had elapsed. The "breathing spell" contracted for was not allowed; in fact, in the rapid progress of this extraordinary foreclosure, *there was no breathing spell anywhere.*

IV.

The court erred in confirming the sale without notice and without time to file exceptions thereto.

In the statement of the case by the court below it is said:

> "The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside."

This is incorrect. The petition for the appeal (R. p. 203) complains of errors in the orders and decrees designated and set

forth in an Assignment of Errors, and an appeal is prayed against the purchasers. The tenth assignment of errors is as follows:

> "The court erred in confirming the sale herein, and in not giving time in which to file exceptions to the same."

So that the appeal in this case was also from the order confirming the sale. The error consists in not laying over the report, so as to give the parties opportunity to except to it. The report of sale was filed on the 10th of March, 1897, and was confirmed on the same day by the consent of the mortgagees, the Railroad Company, and the original creditor, John T. Mills. The Louisville Trust Company was not present, had no notice, and no opportunity was given it to except to the sale. And this was done, though on the day before it had filed its petition contesting the correctness of the judgment and praying that the decree of sale be set aside, or that the sale be postponed.

It has been often held that an order of confirmation of sale is a final decree, and an appeal would lie by any person who had interest in the matter.

> Blossom v. R. R. Co., 1 Wall. 65;
> Butterfield v Usher, 91 U. S. 246; and in

Sage v. R. R. Co., 96 U. S. 712, the Court said:

> "We have often decided that a decree confirming a sale, if it is final, may be appealed from. In this case it is final, so far as the title under the sale is concerned. It cuts off the equity of redemption by the railroad company and the junior mortgagees and *general creditors*, except as provided in the decree of October 22d, and passes the title to the purchaser subject to certain trusts already fixed by the Court, over which the present appellants have control only through their appeal from the former decree. No reversal of any order hereafter made will necessarily divest this title. The proceedings hereafter will relate only to the disposition of the property acquired by the purchase and the proceeds of the sale. For relief against the sale, resort can alone be had to an appeal from the decree of confirmation."

The practice in England, and which has been approved in this country, is that a decree for the confirmation of a sale must give time for filing exceptions thereto, and this has been approved and is the practice adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason, 145 U. S. 349–364;
Mayhu v. West Virginia Oil Co., 24 F. R. 205;
Central Trust Co. v. Sheffield Co., 60 F. R. 9.

V.

The Mortgages foreclosed were, by the laws of the State of Illinois, void as to property within that State.

The Circuit Court, in its decree, adjudged that the mortgages were a valid lien upon the property of the Company in the State of Illinois. The mortgages purport to cover a leasehold of a railroad and of terminals in that State, but does not state the terms of the lease. It is submitted that it makes no difference whether it be a leasehold or a freehold. It is property situated in the State of Illinois. No authority need be cited for the doctrine that in such case the validity of the mortgage must depend upon the local law. The rule is absolute. And in such cases it was well said by Mr. Justice Brewer, in Detroit v. Osborne, 135 U. S. 498:

> "Even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that Court, undisturbed by legislative action, is the law of that State."

The title of the Louisville, New Albany & Chicago Railway Company to the property in Illinois was derived as follows:

The Chicago & Dyer Railroad Company, a corporation of Illinois, was chartered to construct a railroad from Chicago to

the Indiana State line. The Chicago & Indianapolis Air Line Railroad Company was an Indiana corporation, chartered to construct a railroad from Indianapolis to the State line. These two corporations were consolidated, or attempted to be consolidated, *in* 1881, under the name of the Chicago & Indianapolis Air Line Railroad Company. Afterward this Company was incorporated with the Louisville, New Albany & Chicago Railway Company, another corporation of Indiana. At the time of the consolidation of the Chicago & Dyer Railroad Company and the Chicago & Indianapolis Air Line Railroad Company, there was no law in the State of Illinois which authorized a consolidation of a railroad company in that State with a railroad company in another State, and no such law was passed *until* 1883. The effect of an attempt at such consolidation came before the Supreme Court of Illinois in the case of the American Loan and Trust Company v. Minnesota Co., 157 Ill. 741; 42 N. E. Rep. 153. That court decided that such an attempted consolidation was absolutely void, and that a mortgage executed by such a pretended consolidated company upon property in Illinois was void and of no effect.

The Court in that case said:

> "So the conclusion must be that in 1882 railroad corporations organized under the laws of Illinois had no authority whatever, unless granted in their respective special charters, to consolidate with railroad companies of other States. Indeed, the statutes of the State then in force seem plainly to show a then prevailing legislative and public policy opposed to such consolidations. And it is hardly necessary to suggest that the act of June 14, 1883 (Laws 1883, p. 124; 2 Starr & C. Ann. St. p. 1916), and the act of June 30, 1885 (Laws 1885, p. 29; 3 Starr & C. Ann. St. p. 1031), are not retrospective, and do not affect the questions at issue in this litigation." . . . "For the reasons we have stated, the supposed consolidated corporation of the States of Wisconsin, Minnesota, and Illinois, called the Chicago, Freeport & St. Paul Railroad Company, is not, and never was, a corpora-

tion either *de jure* or *de facto*. The right of way contracts and the trust deed made to appellant were and are invalid, and this because there was no corporation in existence with capacity to either obtain a right of way or contract or act to be bound. Pearce v. Railroad Co., 21 How. 441.

"The contracts for right of way can not be regarded as contracts made by the landowners with the Chicago, Freeport & Northwestern Railroad Company, of Illinois. They do not purport to be the contracts of said company, and there are no facts stated that show that they are its contracts. The supposed consolidated corporation, being without capacity to make a contract, could neither bind itself nor the Illinois corporation. The resolutions of the Chicago, Freeport & Northwestern Railroad Company, of Illinois, that are set out at large in the bill of complaint, avail nothing. The proposed authority to execute a trust deed and bonds was an authority that was to be exercised either by the Illinois corporation itself or by a consolidated corporation of Illinois, Wisconsin, and Minnesota; and the Illinois company executed no such deed or bonds, and no such consolidated corporation ever had either a *de jure* or *de facto* existence. Besides this, the Illinois company had no power or authority to issue bonds, or authorize any other person or corporation to issue bonds for the purpose of constructing railroads in the States of Wisconsin and Minnesota. The capital and property of the Chicago, Freeport & Northwestern Railroad, of Illinois, could not lawfully be subjected to the payment of the liabilities of the Chicago, Freeport & St. Paul Railroad Company, that was lawfully organized under the laws of Wisconsin and Minnesota, for the construction of certain railroads in said States."

It can not be denied that this is the determined, fixed, absolute law of the State of Illinois. The Circuit Court of Appeals, however, refers to the very recent case of the Continental Trust Co. v. The Toledo Co., 82 F. R. 642, as having decided in opposition to the appellant's contention. It is submitted that that case is not only not inconsistent, but confirms the position. The consolidation in that case took place *after the act of* 1883, and because there could *then* have been such a corporation *de jure*, the Court held that it was one *de facto*. But the contention in this case is

not like the one in that case. The assignment of error here was that the Court erred in deciding that the mortgages were valid upon the property *situated within the State of Illinois.* The appellants did not contend that the Indiana corporation had lost its existence, or that the mortgages were not valid upon the property within the State of Indiana. It was insisted only that, *by the law of the State of Illinois, the consolidation was invalid, and that the mortgages were void upon property within that State.* And if the deliberate decision of the highest Court of that State is to be followed in determining such a question, then the mortgages were and are void as to such property.

The statement in the opinion of the Circuit Court of Appeals, that the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness and to enable it to carry on its own business, is not a correct statement of the appellant's attitude. The Court misconceived the position taken by the appellant, and therefore did not consider or pass upon the real question at issue.

VI.

Finally, the appellant complains that, while the Circuit Court of Appeals declared that the petitioner had no standing in Court, and was not entitled, therefore, to have a consideration of the merits of the case, it proceeded to make a decision and render a decree which would forever bind the appellants from attacking that decree which it claims to be fraudulent. Instead of dismissing the bill without prejudice, it dismissed it absolutely, and in its opinion purported to decide questions which were not raised, and to leave undetermined those which were. Surely, it can not be right to hold that a party has no standing in Court, and at the same time render a decree against him upon the merits of the case.

VII.

In this case there are collected and associated together all of those abuses which have made some railroad foreclosures odious. It is seldom, however, that the powers of the Court itself have been used to facilitate and make easy the course of the wrong-doer. The only and best protection now afforded by law to those creditors and stockholders who are not in control of the affairs of the corporation, is founded upon the undoubted integrity and the sharp discrimination of the courts of the United States. It is remarkable, therefore, when the powers of such a Court have, without proper examination, been used to assist and countenance those proceedings which it should be the first to hinder.

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